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No. 10-205 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

U.S. INFO. SYSTEMS, INC.,
ODYSSEY GROUP INC., AND BLUE DIAMOND
FIBER OPTIC NETWORKS, INC.,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION NUMBER 3, AFL-CIO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF NAMED RESPONDENTS

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QUESTIONS PRESENTED

1. Is any issue presented for review when three lower courts applied the summary judgment standards for inferring a conspiracy articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) in exactly the manner recently confirmed in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007), and consistently and recently applied in other Circuits, when the Petition is premised on the claim that *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), *sub silentio*, revised *Matsushita* and it urges a new standard for summary judgment which avoids the well-settled limits on the ability to infer a conspiracy without any basis in precedent, economics or logic and which was not urged below?

2. Is there any reason for further antitrust review of an extensive factual record relating to isolated claims of jobsite conduct on a few of thousands of locations where rival labor unions overlap when that record contains no proof of conspiratorial behavior after years of discovery, and where there is abundant evidence and economic principles which required the conclusions uniformly reached below, and Petitioners made a decision not to attempt to refute the evidence and economic principles which negated a conspiracy?

3. Can review of a non-precedential summary order of the Second Circuit provide a basis to revisit the application of well settled summary judgment standards to the evidence carefully scrutinized by the Magistrate Judge, the District Court and the Court of Appeals?

PARTIES TO THE PROCEEDING

1. U.S. Information Systems, Inc. ("USIS"), Odyssey Group, Inc., and Blue Diamond Fiber Optic Networks, Inc.

2. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO ("Local 3"), and Local 3 signatory contractors ADCO Electrical Corporation, Five Star Electrical Corporation, Nead Information Systems, Hugh O'Kane Electric Company, LLC and A&R Electrical Maintenance, Inc.

RULE 29.6 DISCLOSURE

Respondent Five Star Electrical Corporation is a privately held corporation whose stock is wholly owned by its privately held parent corporation, Green Star Services Corp., and no publicly held corporation owns 10% or more of its stock.

Respondent Hugh O'Kane Electric Company LLC is a privately held corporation whose stock is wholly owned by its privately held parent corporation, Lexent, Inc., and no publicly held corporation owns 10% or more of its stock.

Respondent ADCO Electrical Corporation is a privately held corporation with no corporate parent, and no publicly held corporation holds 10% or more of its stock.

Respondent International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, is an unincorporated association of workers functioning as a labor organization in New York City, Westchester County and part of Fairfield, Connecticut.

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STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Respondents moved for summary judgment after pretrial proceedings that involved more than 100 subpoenas, well over 250,000 pages of documents, nine expert reports, eight days of expert depositions, and at least 420 hours of testimony from 40 different fact witnesses. A detailed Report and Recommendation applied the rules set forth in *Matsushita* and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) to this extensive record and found "no evidence" (Petitioners' Appendix ("App.") C, 44a) of the conspiracy required for a claim under Section 1 of the Sherman Act (the "Report"). Summary judgment was recommended and confirmed after a *de novo* review by the District Court (App. B, 6a-12a). A panel of the Second Circuit conducted a *de novo* review of the record and affirmed the decision of the District Court in an unsigned, non-precedential summary order (App. A, 2a-5a). *En banc* review was denied (App. D, 56a-57a).

The Report applied criteria for determining the adequacy of the proof in support of the effort to infer a conspiracy drawn directly from the "tends to exclude" language of *Matsushita*. It reflected consideration of all of the evidence relied on by Petitioners to support the inference of a conspiracy (App. C, 38a-52a) among respondent Local 3 and the other named respondents which are electrical contractors employing Local 3 members, as well as the dozens of other firms employing Local 3 members. The Report explicitly drew all inferences in favor of the non-moving parties. It

recommended, based "on the record taken as a whole," that summary judgment be granted in favor of the Respondents because of the absence of proof of a conspiracy. In opposing summary judgment, Petitioners chose not to meet their burden to proffer any evidence in response to the proof and economic evidence which negated a conspiracy, and which supported the plausible alternative non-conspiratorial explanations established by Respondents. Instead, they made the strategic choice to rely only on their own "proof" and assert that if a plaintiff, in opposing summary judgment, offers any proof of an inferential conspiracy, it is entitled to go to the jury (Pls' App. Br. pp. 36 and 40).

The Report of the Magistrate Judge states:

> The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time (App. C, 44a).

This critical conclusion that there was no proof of concerted action was later repeated (App. C, 51a-52a).

The District Judge conducted a *de novo* review of the record and also found that the possibility of jobsite action by some individuals on isolated projects could not substitute for the absence of proof of a conspiracy (App. B, 11a-12a). The Court of Appeals similarly conducted a *de novo* review and issued a Summary Order with no precedential effect which found that the proper antitrust summary judgment standard set forth in

Matsushita had been applied, that it was not changed by *Kodak*, and that the District Court properly granted summary judgment to Respondents (App. A, 4a). The entire Second Circuit denied the Petitioners' motion for a rehearing *en banc*, premised on Petitioners' argument that the Panel had impermissibly "weighed" the proof.

In an earlier opinion, the Magistrate Judge had addressed many of the decades-old decisions and decrees in labor related proceedings on which Petitioners now rely in attacking Local 3 (Pet. pp. 4-5). Petitioners fail to disclose that these decisions and decrees were considered and ruled inadmissible. *See U.S. Info. Systems, Inc. v. I.B.E.W. Local Union No. 3*, No. 00-4763, 2006 U.S. Dist. LEXIS 52938, at **52-57 (S.D.N.Y. Aug. 1, 2006). Petitioners did not seek review of this decision which became the law of the case. It is therefore improper for Petitioners to propose to rely on these inadmissible determinations, which are in any event irrelevant to the issue of conspiracy.

The Magistrate Judge observed that the conduct alleged by Petitioners, if proven, could also be cognizable under other statutes such as the National Labor Relations Act or the penal code (App. C, 51a). The Opinion does not conclude that there was such proof, but properly concludes that in a Section 1 case, such assertions are not a substitute for the requisite proof of concerted action (App. C, 52a).

II. THE LEGAL PRINCIPLES UNIFORMLY APPLIED BELOW AND THE PETITIONERS' PROPOSED NEW PRINCIPLES

All of the courts below applied the well-settled summary judgment standards articulated in *Matsushita* to Petitioners' argument that a conspiracy could be inferred. Their application of these standards was consistent with controlling precedent and raised no controversial issues of law. The same analyses and applications of *Matsushita* have recently been recognized as controlling in several Circuit Court opinions, and were confirmed by *Twombly* as the governing authority on summary judgment when there is a claim that an antitrust conspiracy should be inferred.

Petitioners premise their first Question Presented on the proposition that these standards were either previously modified or made inapplicable by a sentence in *Kodak*, a case which had nothing to do with the inference of a conspiracy. No court addressing an effort to infer a conspiracy has endorsed Petitioners' theory about *Kodak*, or expressed any hesitation in applying the summary judgment standards as articulated in *Matsushita* and as applied by the courts in this case. Three Circuit Courts of Appeals have previously addressed this argument, including the Second Circuit here, and uniformly found it baseless. In the proceedings below, the Petitioners candidly argued that, under their reading of *Kodak*, a court addressing a summary judgment motion need only review the plaintiff's claims and proposed inferences in a vacuum, without consideration of the defendants' proof and the non-conspiratorial explanations for the conduct alleged, *i.e.*,

Petitioners argued a plaintiff had no obligation to provide proof or respond to the showing by defendants that there was no basis for finding concerted action.

Petitioners have now revised their theory, and contend that *Kodak* limits *Matsushita*'s "tends to exclude" language to "implausible" conspiracies that are otherwise socially redeeming (Pet. pp. 16-19, 25-26). They advocate the creation of a lower threshold for proof of conspiracy where a plaintiff attaches pejorative labels to the conduct alleged. Such a proposed standard is not supported by any authority or logic, nor tenable as an antitrust principle, since proof of a conspiracy is a threshold element of all Sherman Act §1 cases. It is particularly inappropriate in this case which presents a record of vigorous competition in the marketplace, the availability of other remedies for any grievance, and the record contains no facts which militate in favor of creating new antitrust principles.

Petitioners' Second Question Presented raises no cognizable legal issue or principle but instead simply repeats an argument rejected below, that the Magistrate Judge dismembered the proof, weighed competing inferences, and failed to draw inferences in favor of the Petitioners. After a *de novo* review of the record, the District Court reached the same conclusions as the Report as to the absence of proof of a conspiracy. In a *de novo* review, the Second Circuit rejected the same contentions as Petitioners now urge, finding that there were no instances in which the District Court drew inferences in favor of the defendants or ignored any evidence that would merit denial of summary judgment.

Simply put, Petitioners ask this Court to grant *certiorari* to evaluate the factual record for a fourth time.

III. THE BUSINESS AND THE ENTITIES INVOLVED DO NOT JUSTIFY FURTHER REVIEW OF THIS RECORD OR RAISE ANY ANTITRUST ISSUES

This case involves rival labor unions and companies that are engaged in the business of installing electrical wiring and tel-data equipment in new buildings or other major construction. Petitioners have never disputed that the business is highly competitive and they offered no proof of market share or market effect. There are dozens of electrical contracting firms which do wiring for general use and for tel-data, while some do only one or the other. The three Petitioners focus entirely on providing installation of wiring for tel-data. Their business model is to try to persuade building owners or general contractors to split the electrical wiring job and employ a firm limited to tel-data work alongside the electricians doing other wiring, by offering to do the tel-data phase of the work at a lower price. They charge less by using workers with limited training, who belong to a union (Communications Workers of America, "CWA") with significantly lower wage rates than workers belonging to Local 3, who do all phases of electrical work.

Petitioners proposed a geographic market defined to be coextensive with the area covered by Local 3 (*i.e.*, New York City, Westchester and part of Fairfield, Connecticut), whose members are fully qualified electrical workers. Earlier jurisdictional disputes

between Local 3 and the CWA were governed by the National Labor Relations Board ("NLRB") which addressed all such issues as they arose, and which continues to exercise its authority, as appropriate, with mixed results for Petitioners. The Petitioners were wildly successful in enhancing their sales and profits before, during and after the period covered by the Complaint. The lead plaintiff (USIS) secured many thousands of jobs (one executive said 9,000 over the past few years), was highly profitable, and its executives conceded that its CWA employees worked side-by-side with Local 3 electrical workers without incident on virtually all of these thousands of construction sites.

The foundation of Petitioners' case is the assumption that their lower prices should result in them being awarded every job on which they bid, so that any assignment which went to the Local 3 electrical contractor doing the general electrical work could plausibly be inferred to be attributable to some malevolent and illegal force. There was absolutely no proof of Local 3 involvement in the sales efforts by contractors which competed for business by claiming advantages for using Local 3 contractors, and no basis exists for inferring that there was joint action of any sort.

Despite the absence of proof of any conspiratorial behavior, and the existence of reasons for every choice made by building owners and general contractors, Petitioners argued that if a contractor using Local 3 workers persuaded its customer to select it for tel-data work, it was plausible to infer that it was a result of conspiratorial behavior orchestrated by the union

without proof of overt acts by Local 3. They argued that on summary judgment the Petitioners and the court should ignore all of the proof and economic analyses establishing the reasons some general contractors or owners might prefer to deal with: (i) a single electrical contractor for both the electrical wiring and tel-data work; (ii) an electrical contractor with which it had a long history; and (iii) an electrical contractor employing workers belonging to a union (Local 3) with good relations with other craft unions working on the job, including membership in the organizations of unions which were signatories to legally-approved agreements which guaranteed labor peace on jobsites with many different unions represented. The union to which Petitioners' workers belonged was not a signatory to these agreements, so that disputes among CWA workers and the many other unions on the jobsite were not subject to resolution under well established mechanisms which avoided jurisdictional issues.

Petitioners are quite facile in their aspersions about Local 3, but make no pretense of having offered any proof of any conduct by Local 3 or its involvement in any alleged conspiracy. Rather, if an unnamed worker allegedly exercised a contractual right to refuse to work overtime or there was any incident on a jobsite, it was contended by Petitioners that it should be attributed to a Local 3 member and then inferred to be a part of the plot to force a CWA contractor off the job and also inferred to be an act of Local 3 itself in furtherance of the conspiracy. There was no proof of anything other than some contractors aggressively competing against Petitioners at several sites and the "facts" summarized in the Petition purport to show only conduct by a few Local 3 contractors competing for isolated jobs.

The failure of proof is particularly glaring in view of the provisions of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. §106, which precludes liability of a union for "unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." Petitioners made no effort to establish that Local 3's leadership or its governing groups had any knowledge or involvement in any of the alleged few incidents. The lower courts did not reach the issue of the application of the Norris-LaGuardia Act since there was no arguably conspiratorial conduct to attribute. The Magistrate Judge specifically noted that it was not necessary to address that statute, in view of the Petitioners' failure of proof (App. C, 52a, fn. 23).

The dispositions below reflect recognition and application of the universally accepted *Matsushita* standards for summary judgment. In its summary order, the Second Circuit specifically stated that "we find no instances in which the district court drew inferences in favor of the [Respondents] or ignored evidence that would merit the denial of summary judgment to them under the *Matsushita* standard" (App. A, 5a). The courts engaged in a searching and detailed analysis of the Petitioners' evidentiary submissions (App. C, 19a-29a, 10a and 3a), essentially in the order in which Petitioners submitted them, contrary to the baseless claim that the lower court improperly "dismembered" or compartmentalized Petitioners' evidence. Neither the applicable principles nor the findings below present issues requiring further review.

Instead of proof of involvement by Local 3 or anyone else in an alleged conspiracy, the Petitioners' "case" against Local 3 consisted of attacks based on events over seventy years ago and selected NLRB and district court determinations involving Local 3 unrelated to conspiracy or antitrust issues. These cases and proceedings were properly ruled inadmissible in a decision not appealed. *See U.S. Info. Systems, Inc. v. I.B.E.W. Local Union No. 3*, 2006 U.S. Dist. LEXIS 52938, at **52-57. Nevertheless, the same hyperbole and aspersions regarding Local 3 form the essence of this Petition. The irrelevant and inflammatory attacks on Local 3 (Pet. pp. 3-5), cannot substitute for Petitioners' lack of proof of conspiracy.

Illustratively, the first and most inflammatory story on which Petitioners rely (Pet. p. 10), is based on alleged statements by an employee of a contractor which successfully sought to keep tel-data work for itself. Without record citation or basis, the Petition falsely labels this contractor employee as "a Local 3 agent" (p. 10) (but not an officer) and ignores his motivation to keep this business for his employer.

In sum, Petitioers did not attempt to prove anything about Local 3 or explain how they had been so successful if this conspiracy existed. Similarly, they made no effort to refute the obvious fact that if their claims were true about the power and conduct of Local 3, then Petitioners would have no business at all and Local 3 contractors would have been awarded every single tel-data job. As one court found in an earlier case, Local 3 did not need a conspiracy to exclude members of a rival union. *See Building Industry Fund v. I.B.E.W. Local Union No.*

3, 992 F. Supp. 162, 181-82 (E.D.N.Y. 1996), *aff'd mem.*, 141 F.3d 1151 (2d Cir. 1998).

This record confirms there was no exclusion and no conspiracy in a vigorously competitive market. Petitioners had no proof of a conspiracy and their theory made no sense.

REASONS FOR DENYING THE PETITION

I. NO REASON EXISTS TO RECONSIDER *MATSUSHITA* OR ITS APPLICATION TO THIS CASE SINCE NO CIRCUIT HAS A VIEW CONTRARY TO THE PRINCIPLES APPLIED BELOW

A. There Is No Circuit Split.

It was properly recognized below that: (i) *Matsushita* and *Monsanto* limit the inferences which can be drawn in support of an effort to show the concerted action necessary to establish a Sherman Act §1 claim; (ii) conduct as consistent with competitive conduct as with conspiracy does not support an inference of an antitrust conspiracy; and (iii) a plaintiff opposing summary judgment must present proof that tends to exclude independent action (App. C, 39a-40a). The District Court applied these same principles and authorities in a *de novo* review which adopted the Report and granted summary judgment (App. B, 11a-12a). The Second Circuit, in a summary order, also conducted a *de novo* review and concluded that the District Court properly applied *Matsushita* and rejected the contention that *Kodak* altered *Matsushita*, citing

the confirmation of the *Matsushita* standards by this Court in *Twombly*, 550 U.S. at 554 (App. A, 4a):

> The [Petitioners] argue that the Supreme Court altered this ["tends to exclude"] standard in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), by stating that "*Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach the jury," *id.* at 468. We disagree. This language explains the *Matsushita* standard. It does not alter it. This view is supported by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), where the Supreme Court cited *Matsushita* for the proposition that "at the summary judgment stage a [Sherman Act] §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently," *id.* at 554.

The entire Second Circuit denied a request for *en banc* consideration. The principles applied below are well established, non-controversial and there is no conflict or other reason for them to be reconsidered.

Petitioners now contend that the Third and Seventh Circuits apply their reading of *Kodak* (without citing that Opinion) and have adopted a revised *Matsushita* standard. They also rely on older precedent from the Ninth Circuit, which Petitioners acknowledge has been "abrogated." (Pet. p. 26). A review of decisions in those Circuits, both cited by Petitioners and omitted, establish that Petitioners are incorrect and that the standard

articulated in *Matsushita* is universally applied with no Circuit conflict.

The Third Circuit recently confirmed that the *Monsanto* and *Matsushita* standards apply to limit permissible inferences of conspiracy, and require summary judgment if the challenged conduct is equally consistent with permissible conduct or can be explained by independent business judgment. In *In re: Insurance Brokerage Antitrust Litigation*, MDL No. 1663, 2010 U.S. App. LEXIS 17107, at **49-50 (3d Cir. Aug. 16, 2010), the Third Circuit engaged in a detailed analysis of *Twombly* with respect to its application at the pleading stage and at the summary judgment stage, observing, *inter alia*, that ". . . in order to enforce the Sherman Act's requirement of an agreement, the Supreme Court has required that 'a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.'"

Similarly, in *Cosmetic Gallery, Inc. v. Schoeneman Corporation*, 495 F3d 46, 51-52 (3d Cir. 2007), a group boycott case, the Third Circuit explicitly cited the general *Matsushita* standards *(i.e.*, "proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action" and "at the summary judgment stage a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently") and affirmed summary judgment on behalf of defendants, finding that the proffered proof to support an inferential conspiracy failed to exclude the possibility that the distributors acted independently. Moreover, in July 2010, the Third

Circuit reviewed the relevant authorities, noted the *Kodak* decision, and confirmed that the principles of *Matsushita* as applied below are clearly controlling. *See Race Times America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010); *see also In re: Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999) (applying general *Matsushita* standard). Petitioners' suggestion of a conflict with the Third Circuit (Pet. pp. 24-25) based largely on the conclusion in *Petruzzi's IGA Supermarket, Inc. v. Darling–Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert denied*, *Moyer Packing Co. v. Petruzzi's IGA Supermarkets*, 510 U.S. 994 (1993), that the evidence in that record was sufficient to withstand summary judgment is clearly misplaced.

Miles Distributors, Inc. v. Specialty Construction Brands, Inc., 476 F.3d 442 (7th Cir. 2007) is the most recent published decision in the Seventh Circuit addressing the proper summary judgment standard in a Section 1 case. It cited these same principles of *Matsushita* to require that a plaintiff seeking to infer an antitrust conspiracy must provide proof which tends to exclude the possibility of unilateral conduct and that conduct which is consistent with permissible competition does not support an inference of conspiracy. *Monsanto* was there said to stand for the proposition that a conspiracy cannot be inferred from dealer complaints. *Id.* at 449. Notably, *Miles* is not mentioned in the Petition.

The few Seventh Circuit decisions authored by Judge Posner (Pet. pp. 22-23) do not remotely suggest that *Kodak* changed, refined or in any way altered the summary judgment standards enunciated in

Matsushita and *Monsanto*. The determinations of the adequacy of the proof in those cases do not suggest the existence of any conflict between the Seventh Circuit and any of the other Circuits, which all adhere to the *Matsushita* standard.

Similarly, the Eleventh Circuit in *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003) (Pet. pp. 8-9) and the Ninth Circuit in *In re: Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), *cert. denied, Gangi Bros. Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000) (Pet. p. 26) confirm that any suggestion that earlier opinions in those Circuits cut back on *Matsushita* have been "abrogated." In fact, *Citric Acid* explicitly rejected an argument that *Matsushita* is of limited applicability in Section 1 inferential conspiracy cases:

> The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy as [plaintiff] does – must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we explained, well-established in both this circuit (citing cases) as well as in our sister circuits (citing cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits). 191 F.3d at 1096.

The commentators do not see any doubt that the principles are clear and not controversial: "When the evidence is in equipoise . . . summary judgment will be granted [to the defendant]." II P. Areeda & H. Hovencamp, ANTITRUST LAW 70 (1995).

B. *Kodak* Did Not Change The Law On Proof Of Conspiracy.

The opinions cited in the Section above were decided well after *Kodak*, and none of these Courts found anything in *Kodak* which required clarification or militated against the application of *Matsushita* as applied by the Courts in this case. Petitioners cite no opinion which finds *Matsushita* unclear, or supports their contention that *Kodak* somehow signaled a departure from the universally applied principles of *Matsushita* when addressing an effort to infer a conspiracy. As recently as 2007 in *Twombly*, this Court unambiguously pointed to *Matsushita* as the hedge against false inferences of conspiracy at the summary judgment stage. 550 U.S. at 554. The Petitioners' assertion (Pet. pp. 16-19) that *Kodak* affected the clear mandate of *Matsushita* is not supported by any authority. It was previously raised and rejected by the Eleventh Circuit in *Williamson* and the Fourth Circuit in *Merck-Medco Managed Care, LLC v. Rite-Aid Corp.*, No. 98-2847, 1999 U.S. App. LEXIS 21487, at *21 (4th Cir. Sept. 7, 1999), before it was rejected by the Second Circuit below. There is thus no precedent or logic which would read *Kodak* (a tying case) to affect the law on inference of a conspiracy.

Twombly did not mention *Kodak* in pointing to *Matsushita* as controlling. Certainly there is no conflict requiring resolution. As noted, the opinions by Judge Posner relied upon by Petitioners (Pet. pp. 22-23) do not suggest that *Kodak* changed *Matsushita*.

Petitioners below claimed that *Kodak* undercut the obligations on a plaintiff articulated in *Matsushita*, so

that a plaintiff's failure or inability to respond to the overwhelming proof against the claim of conspiracy was not relevant on summary judgment. The "revision" of *Matsushita* which Petitioners now urge, limiting its application to "implausible" conspiracies that are socially redeemable, is equally baseless and not consistent with *Kodak* or *Twombly*. It was not urged below. In fact, their new theory would actually impose on Fed. R. Civ. P. Rule 56 a presumption no longer even applied under Rule 12 (b)(6). There is simply no judicial authority or economic justification which suggests that this Court should address such a change in *Matsushita*.

II. THE REVIEW OF THE FACTUAL RECORD AND THE CONCLUSIONS REACHED WERE CONSISTENT WITH THE PROOF AND APPLICABLE PRECEDENT WHICH NEED NOT BE RECONSIDERED FOR THESE PETITIONERS

A. *Matsushita* Was Properly Applied After Repeated Careful Reviews Of The Proof.

The detailed Report below reflects consideration of both the circumstantial evidence and the specific events relied on by Petitioners to support the inference of a conspiracy (App. C, 38a – 52a). In recommending summary judgment, the Report states, *inter alia*: "The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time." (App. C, 44a). Similarly, there was no evidence found from which it might properly be inferred that any contractor-Respondent had conspired with Local 3 or anyone else.

The conclusion of "no evidence" was not based in any way upon a usurpation of the role of fact finder and did not require a conclusion that there was no misconduct by anyone. The critical conclusion was that there was no proof of concerted action (App. C, 51a-52a). The finding of "no proof" is a legal conclusion and not a weighing of evidence. The District Judge conducted a *de novo* review and also found that the possibility of actions by some individuals could not substitute for the absence of proof of a conspiracy involving Local 3 (App. B, 11a-12a). The Court of Appeals also conducted a *de novo* review and found that the proper summary judgment standards had been applied. The proof was so inadequate, it was not even deemed necessary (App. C, 52a, n.23) to address the application of the Norris-LaGuardia Act which would preclude liability of the union where the only alleged actors are individuals who were not shown to be carrying out official union policies. The "standard" used by all of the courts in this case is drawn right from *Matsushita* and, as shown above, is consistent with the universal interpretation of that Opinion.

B. The Conclusions Reached By All Five Jurists Below Upon Their Review Of The Factual Record Were Consistent With The Proof And Applicable Precedent And Do Not Merit Reconsideration By This Court.

In this Petition, as they did in the Courts below, Petitioners attempt to compensate for the lack of proof of conspiratorial behavior by the use of unseemly labels and charges against Local 3 which have nothing to do with proof of a conspiracy. Clearly it was, and continues

to be, the Petitioners' hope to inflame the Courts and a jury against a labor union by attacking the union of 30,000 hard working members and calling its conduct criminal or otherwise subject to condemnation (*see, e.g.*, Pet. pp. 2-5, 35-40).

There is, however, no basis or need to undermine the requirement of proof of conspiratorial behavior for a Sherman Act §1 case as Petitioners urge. The record confirms there was no conspiracy or effect in any market which requires scrutiny under the antitrust laws, and those conclusions are not overcome by invective aimed at Local 3. The attacks on Local 3 based on irrelevant and inadmissible NLRB and district court decisions (Pet. p. 5) – the most recent of those cited was twenty-two years ago – is not tenable but certainly these remote events have nothing to do with conspiracy or summary judgment. As noted earlier, in an August 2006 Opinion, the Magistrate Judge addressed most of these decisions and decrees and properly held them inadmissible. *USIS v. I.B.E.W. Local Union No. 3*, 2006 U.S. Dist. LEXIS 52938, at **52-57. The Petitioners nonetheless improperly cited these earlier opinions as justifying some inference of conspiracy against Local 3. In the Petition they continue that effort without mention of the August 2006 Opinion, and without providing any basis for flouting or changing the ruling against their use which Petitioners did not seek to have reviewed by the District Court. They waived any effort to rely on this excluded "proof."

Similarly, the Petition presents no issue for this Court by its repeated shrill description of conduct, none of which was proven, as "illegal" or criminal. These

unproven claims were referred to by the Report, *arguendo*, for the narrow proposition that even a claim charging unilateral conduct that was unlawful under some other statute does not eliminate the need for a plaintiff to prove conspiracy (App. C, 51a-52a). The rejection of Petitioners' reliance on such a claim and the finding of "no evidence" reflect a proper legal conclusion, without resolving any factual issues or agreeing with Petitioners' claims. The availability of other remedies for charges of unfair labor practices or penal violations confirms that there is no issue for this Court which would justify taking a case to consider expansion of the antitrust laws or elimination of the need to show a conspiracy. *See, e.g., Sanderson v. Culligan International Co.*, 415 F.3d 620, 623 (7th Cir. 2005); *Reading International Inc. v. Oaktree Capital Management LLC*, No. 03-1895, 2007 U.S. Dist. LEXIS 504, at *24 (S.D.N.Y. Jan. 8, 2007) ("under section 1 it is irrelevant if [an antitrust defendant] acted like a bully, as long as it did so independently"). No matter how egregious Petitioners may consider their charges, there is simply no need or reason to "clarify" *Matsushita* to introduce scrutiny of allegations of character or prior bad acts into the summary judgment deliberations where the issue is proof of conspiracy.

C. The "Expert Opinion" Adds Nothing.

In an attempt to mask their glaring lack of evidence and attack the Courts' carefully-considered opinions, Petitioners again attempt to rely on their expert to prove the existence of a conspiracy (Pet. pp. 12-14). Yet, it is well-settled that "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a

substitute for them." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *see also Citric Acid*, 191 F.3d at 1102 (rejecting the use of expert proof submitted by plaintiffs opposing a motion for summary judgment in order to prove facts supporting the alleged conspiracy).

Contrary to their argument that their expert was "*Daubert* approved" and had properly "concluded that Local 3, acting in concert with defendant electrical contractors, engaged in anticompetitive conduct..." (Pet. p. 12), the extensive proceedings addressed to his proposed testimony resulted in a ruling that barred Petitioners from offering or relying on such a conclusion, while limiting Dr. Dunbar to testifying about economics of market behavior. *See U.S. Information Systems, Inc. v. I.B.E.W. Local Union No. 3*, 313 F. Supp.2d 213, 240-41 (S.D.N.Y. 2004). In fact, rather than being "*Daubert* approved" the expert was *Daubert*-limited. His earlier effort to testify about conduct was abandoned, and the Court curiously gave him a second chance with limits which Petitioners now propose to ignore.

Moreover, the Second Circuit correctly observed that the Courts below "rejected the views of [Petitioners'] expert" (App. A, 5a), which is not an issue presented for review.

III. THE NON-PRECEDENTIAL SUMMARY ORDER BELOW CANNOT CREATE A CONFLICT AMONG THE COURTS OF APPEALS

The Petition seeks review of a Second Circuit panel's "Summary Order." But pursuant to Second Circuit rules, summary orders are issued only when the panel unanimously concludes that "no jurisprudential purpose is served by an opinion." Second Cir. IOP R. 32.1.1. Thus, far from presenting a "decision in conflict with the decision of another United States court of appeals," *cf.* Sup. Ct. R. 10(a), the disposition below controls only the parties to the proceeding. It does not — and cannot — conflict with decisions from other courts because it announces no ongoing rule of law. In short, an order without precedential effect cannot create or evidence a conflict with another court of appeals.

Apparently mindful of the constrained effect of the summary order, Petitioners omit to disclose that the Second Circuit Order lacks precedential value. According to Second Circuit Internal Operating Procedures, a reproduction of the order must advertise its limited effect with the words: "*Rulings by summary order do not have precedential effect . . . .*" Second Cir. IOP R. 32.1.1 (emphasis added). Petitioners have failed to comply with this rule and reproduced in their Appendix a copy of the Summary Order without the legend. *See* App. A. Nor have they disclosed anywhere in their Petition that the Second Circuit Order has no precedential effect.

Moreover, the Petitioners' hypothetical conflict between the Circuits not only proves ill-conceived as a matter of law, *supra* Section I, but also fails as a matter

of practice. If the Circuits were truly split on the meaning of *Matsushita*, an unsigned summary order fails to provide a "compelling" instrument for resolving such an important dispute. *Cf.* Sup. Ct. R. 10.

CONCLUSION

The Petitioners have presented no persuasive reason for granting a writ of *certiorari*. The disposition below involves only a unique fact-bound application of settled law with no implication beyond the parameters of this case. The Petition should be denied.

Respectfully submitted,

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